RECORD
AND
BRIEFS

No. 16-373

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM,
Petitioner,

v.

ANZ SECURITIES, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

REPLY BRIEF

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REPLY BRIEF

The petition presents two important and related questions about the application of the rule of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), in securities class action cases, both of which directly implicate square circuit conflicts.

This Court granted certiorari on the first Question Presented only two years ago in *IndyMac*, and the need for review has not abated because the issue continues to arise, producing inconsistent rulings across the nation. Indeed, the court below confirmed that the question is "ripe for resolution by the Supreme Court," noting that because this "issue implicates the very nature of *American Pipe* tolling," the "Supreme Court is in the best position to resolve" it. Pet. App. 5a-6a. The court of appeals further declared that "unless and until the Supreme Court informs us that our decision was erroneous, *IndyMac* continues to be the law of the Circuit and its reasoning controls the outcome of this case." *Id.* 6a.

The second Question Presented is likewise certworthy because it, too, speaks to the nature of *American Pipe* tolling. Petitioner CalPERS directly argued that its individual complaint was timely because it filed its complaint—asserting the same causes of action as the class action complaint—prior to the dismissal of the class action, rendering tolling unnecessary. The court of appeals' sole response was to say that this "argument was presented to the *IndyMac* panel, which declined to adopt it." Pet. App. 5a. Respondents do not dispute that this argument implicates a circuit conflict over the proper application of *American Pipe* to cases in which the individual opt-out plaintiff files its complaint prior to the class

certification decision, and therefore provides an opportunity to resolve that conflict as well.

This case presents an excellent vehicle to resolve both Questions Presented because it directly implicates not only *American Pipe* tolling but also the constitutionally protected right of class action plaintiffs to opt out of class proceedings. It is undisputed that CalPERS was a member of a properly constituted class, and that it opted out of the class settlement in order to pursue the same causes of action presented by the class action. Indeed, CalPERS was exceptionally diligent in pursuing its claims because it filed its individual complaint before judgment was entered in the class action—thus ensuring that it had a live claim against respondents at all times.

Against those considerations, respondents' quibble over the depth and durability of the splits, as well as their merits arguments, fall flat. Respondents' argument that this case is an improper vehicle because it presents two questions is also wrong. The opportunity to resolve two circuit splits is a virtue, not a drawback, of the petition. But if the Court disagrees, then it can avoid any potential complications by limiting the grant of certiorari to the first Question Presented.

I. This Court Should Grant Certiorari To Address Whether *American Pipe* Applies To So-Called Statutes Of Repose.

The first Question Presented is the same question that the Court granted certiorari to resolve in *IndyMac*—and is therefore indisputably certworthy.

1. Respondents argue that the circuit split is shallow and speculate that it may resolve itself if the Tenth Circuit revisits its decision in *Joseph v. Wiles*, 223 F.3d 1155 (10th Cir. 2000). These arguments are persuasively addressed in the reply brief filed by the petitioner in *DeKalb County Pension Fund v. Transocean Ltd.*, No. 16-206, which explains that the Tenth Circuit has reaffirmed *Joseph* both before and after this Court's decision in *CTS Corp. v. Waldburger*, 134 S. Ct. 2175 (2014), thus signaling that it will not revisit its settled precedent. *DeKalb* Reply 3-4.[1]

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[1] Respondents also argue that the Tenth Circuit's decision has been undermined by this Court's decision in *Smith v. Bayer Corp.*, 564 U.S. 299, 313 (2011), which stated that absent class members are not parties to class action lawsuits before the class is certified. BIO 15. But whether unnamed class members are properly deemed "parties" for the purposes of preclusion doctrine has no bearing on whether they may rely on the class action lawsuit to preserve their rights, and thus avail themselves of *American Pipe* tolling. As the Court stated in *American Pipe* itself, when a valid class action commences, "the claimed members of the class stood as parties to the suit until and unless they received notice thereof and chose not to continue." 414 U.S. at 551. Indeed, respondents' reading of *Smith* would produce absurd results: taken at face value, respondents' argument would prevent district courts from certifying a class after the repose period has run—but nobody thinks that is correct. Respondents further argue that this Court denied any distinction between legal and equitable tolling in *Credit Suisse Securities (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1419 n.6 (2012), but that case in fact refused to collapse the lower courts' distinction between legal and equitable tolling. In any event, both *Smith* and *Credit Suisse* were decided before the Court granted certiorari in *IndyMac*, demonstrating that the issue continues to merit this Court's review.

Contrary to respondents' suggestion (BIO 16-18), the split also is not shallow. The decision below is inconsistent with decisions from the Seventh and Federal Circuits, which have held that *American Pipe* tolling is available even vis-à-vis jurisdictional statutes of limitations that are not subject to equitable tolling. Respondents argue that statutes of repose are different because they serve different purposes and create substantive rights. BIO 17-18. But the Seventh Circuit explained in *Appleton Electric Co. v. Graves Truck Line, Inc.*, 635 F.2d 603, 608 (7th Cir. 1980), that in its view the running of a jurisdictional statute of limitations "not only bars the remedy but also destroys the liability." The court of appeals nevertheless held that *American Pipe* tolling applies because "effectuation of the purposes of litigative efficiency and economy . . . transcends the policies of repose and certainty behind statutes of limitations." *Id.* at 609.

Similarly, in *Bright v. United States*, 603 F.3d 1273, 1287-88 (Fed. Cir. 2010), the court recognized that jurisdictional statutes are not subject to equitable tolling, but it concluded that "class action statutory tolling" under *American Pipe* rests on a different footing—not because there is something inherently flexible about a jurisdictional statute of limitations, but instead because *American Pipe* tolling "does not modify a statutory time limit" at all, since the class complaint, which brings the action for all class members, must be timely filed for *American Pipe* to apply. For the same reasons, the *Bright* court also rejected an argument that is plainly analogous to respondents' Rules Enabling Act contention: the argument that federal courts cannot use their procedural rules to enlarge their jurisdiction. *See*

id. at 1286. That reasoning—like the reasoning of the Seventh Circuit—simply cannot be reconciled with the *IndyMac* rule adopted below.

In any event, respondents' attempts to distinguish the Seventh and Federal Circuits' decisions rest on the assumption that their merits arguments are correct, *i.e.*, that statutes of repose create a substantive right to prohibit individual plaintiffs from pursuing their claims after a timely class complaint has been filed, such that the Rules Enabling Act forecloses tolling for the individual complaints. But that point clearly is not conceded, and respondents cite no cases from the Seventh or Federal Circuits accepting that proposition. The principal authority on which respondents rely, *Waldburger*, also never describes statutes of repose that way, and never suggests that the Rules Enabling Act would prohibit *American Pipe* tolling (or any other legal tolling) of repose periods; indeed, it never discusses the Rules Enabling Act at all.[2]

Thus, on the key questions—whether *American Pipe* tolling is legal or equitable, and whether the Rules Enabling Act prohibits tolling of the entire limitations periods in the Securities Act—the courts remain unambiguously and intractably divided, and certiorari should be granted to resolve the conflict.

Respondents also note that the Third and Ninth Circuits are in the process of adjudicating cases involving the Question Presented. BIO 18-19. But that

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[2] Moreover, as explained in the petition (at 18-19), *American Pipe* itself rejected a Rules Enabling Act challenge to its holding. *See* 414 U.S. at 557-59.

only proves that the issue continues to roil the lower courts, consuming judicial resources and disrupting the orderly administration of the securities laws. However those courts rule, the circuits and district courts will still be divided—and litigants in the other circuits that have not addressed the question will still face uncertainty over what to do. Respondents do not argue that either the Third or the Ninth Circuit cases would present a superior vehicle to address the question, so there is no reason to wait for them.

2. Respondents also preview—at length—their merits argument, arguing the *American Pipe* tolling is equitable, that statutes of repose cannot be tolled, and that class members may not feel compelled to opt out to pursue individual claims. BIO 19-29. These concerns are all persuasively addressed in the *DeKalb* Reply (at 6-7, 9-11) and in the petitioner's merits briefs in *IndyMac*, and there is no need to address them again here. In any event, respondents' merits arguments do not relate to the Court's certiorari criteria, and therefore do not weigh against review.[3]

Respondents do raise one point that is specific to this case. They argue that because petitioner obtained favorable judgments against other defendants when its

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[3] Along the way, respondents concede—as they must—that a large number of opt-outs are more likely in large class action cases (like the *Petrobras* case, which resulted in hundreds of opt-outs). BIO 21 n.5. That, of course, is true: opting out is expensive, and only worthwhile in cases involving a substantial potential recovery. Even if the opt-out issue only arises in cases involving a lot of money, it would still be very important—because those cases are important—and would still warrant this Court's review.

opt-out claims were permitted to proceed, similar claims against respondents would expand their liability in violation of their substantive rights. BIO 27. The premise of respondents' argument is that because they may have been required—as a result of differences in litigation strategy and leverage—to pay more money to settle with CalPERS, they were exposed to additional liability in violation of the statute of repose. But statutes of repose are not absolute caps on the value of claims. Imagine the following hypothetical: prior to the expiration of the repose period, the class retained lawyers who were willing to settle with the defendants for a pittance, but after the statute of repose lapsed the plaintiffs fired those lawyers and found new counsel who were determined to get full value for the class claims. If the settlement value increased, the settlement value would not offend the statute of repose. Similarly, if discovery after the repose period revealed that the harm caused by a defendant's fraud was far greater than anticipated, the statute of repose would not prohibit defendants from paying more than they had planned to pay before the repose period expired.

The same is true here. Respondents do not dispute that the class complaint was timely, and that it asserted the very same causes of action against respondents that CalPERS pursued individually. By opting out of the class, CalPERS merely took control over its causes of action from the class representatives—and in the process gave both the class and respondents timely notice of its intent to do so. Thus, respondents have not been exposed to any additional claims or theories of liability, and they have no grounds to plead surprise.

The only difference is that CalPERS is now pursuing its causes of action with its own counsel.

Respondents' argument inadvertently highlights why their rule threatens the constitutional right to opt out of class actions, which exists for precisely this reason, *i.e.*, to allow class plaintiffs who are unsatisfied with the representative action to vindicate their own interests. Respondents argue (BIO 28-29) that while plaintiffs have a due process right not to be bound by a judgment without their consent, they have no separate right to pursue their own claims. That is contrary to every one of this Court's opt-out cases, including *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011), which explained that denial of the right to opt out is constitutionally significant because it strips the plaintiff of his "right to sue." That right would be a nullity if opting out necessarily resulted in the forfeiture of the individual claim on timeliness grounds—which is exactly what would happen without *American Pipe*. *See Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 351-52 (1983). In any event, the scope of the due process opt-out right, and its effect on the availability of *American Pipe* tolling, are exactly what this Court should adjudicate on the merits.

II. This Court Should Grant Certiorari To Address Whether Limitations Periods Apply To Plaintiffs Who File Their Individual Opt Out Complaints While Class Actions Are Pending.

This case also presents a second question, which is whether CalPERS' claims are timely because it took over its causes of action before judgment was entered

on the class complaint, so that CalPERS always had a live claim, and tolling—as that term ordinarily is used—was unnecessary.

1. Respondents argue that *American Pipe* only creates a tolling rule, and that no circuit court has reached a contrary decision. BIO 30. The *American Pipe* opinion, however, was divided into multiple sections. Section I does not discuss tolling at all, but instead sets forth a general explanation of how class actions work under Rule 23. 414 U.S. at 545-52. In that section, the Court explains that "[u]nder present Rule 23 . . . the filing of a timely class action complaint commences the action for all members of the class as subsequently determined," so that "the commencement of the action satisfie[s] the purpose of the limitation provision as to all those who might subsequently participate in the suit as well as for the named plaintiffs." *Id.* at 550-51. That is not a tolling principle, but instead an explanation that the unnamed class members' claims *have been timely brought* if they are members of a putative class asserted in a valid class action complaint. The Tenth Circuit has endorsed this interpretation of *American Pipe*, and respondents themselves cite the relevant cases. BIO 31; *see also* Pet. 30-31 (describing the cases in detail).

Respondents argue that Section 13 precludes CalPERS' contention because Section 13 prohibits the filing of an "action" after three years. BIO 32. But the better reading of the statute is that the word "action" means a "cause of action," and not a "civil action." Section 13, after all, modifies Section 11, which confers a "cause of action" on security purchasers. 15 U.S.C.

§ 77k. That language refers to a claim under Section 11—not to an entire lawsuit. *See Davis v. Passman*, 442 U.S. 228, 240 (1979) (explaining that a statutory "cause of action" is an "element of [a] 'claim'" for relief under that statute). *Cf. Jones v. Bock*, 549 U.S. 199, 220 (2007) (holding, in a case in which an exhaustion requirement provided that "no action shall be brought" absent exhaustion, that courts should read this "boilerplate" language to refer to individual claims, and not entire cases).

In this case, CalPERS' causes of action were brought—on its behalf—in the timely class complaint. CalPERS took over control of them before they were dismissed. Therefore, the timely causes of action merely continued their journey under new stewardship, and tolling arguably was not required.

2. Respondents acknowledge that this question implicates a separate circuit split over whether a plaintiff who files an individual complaint before the district court adjudicates class certification, but attempt to downplay it as "ancillary" and "shallow." BIO 32. The petition illustrates that the split has endured for decades—but CalPERS agrees that it is "ancillary" in the sense that the Court can resolve this case without speaking directly to that question (especially since respondents have not attempted to argue that CalPERS' claim should fail because it filed its own complaint too early). However, when this Court adjudicates CalPERS' argument that its claims are timely because they were brought before the dismissal of the class action, it will necessarily resolve issues underlying the split, and most likely resolve it.

III. This Case Is An Ideal Vehicle.

Respondents do not dispute that but for the statute of repose, CalPERS' claims would be timely under *American Pipe*. Thus, they do not dispute that CalPERS was a member of a valid class action, that its individual causes of action mirror the class causes of action, and that it properly opted out of the class to pursue those causes of action.

Instead, they raise only one vehicle objection, which is that because the petition presents two questions, the Court should not consider either. BIO 35. That cannot be right. The presence of two questions is a feature, not a bug: it will allow the Court to consider the nature and scope of *American Pipe* more comprehensively, and to issue a decision that accounts for more of the fact patterns that regularly arise in securities cases.

If the Court perceives any potential complications arising from the fact that this case presents two questions, it has a number of options to address that potential. The Court could limit the grant of certiorari only to the first question—which would work because this case squarely presents that question on compelling facts. Or, it could grant certiorari in this case and another of the pending petitions in order to encourage a more complete presentation on each of the two questions. Either way, the Court should hear this case, which is the only one that implicates the distinct circuit conflict over the application of limitations periods when the individual plaintiff files a complaint prior to class certification.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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